In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4072

MARTIN ROZEMA, Assignee of the Judgment of THE HALE COMPANY, a corporation, against INTERNATIONAL TRADING COMPANY OF AMERICA, a corporation, *Plaintiff in Error*

vs.

THE NATIONAL CITY BANK OF SEATTLE, a National Banking Corporation, Garnishee Defendant, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, JUDGE

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

This is a garnishment proceeding commenced in the United States District Court for the Western District of Washington, Northern Division, against the National City Bank of Seattle, as garnishee

defendant, by The Hale Company, a corporation, plaintiff, upon a judgment for $5,200 (Record p. 1) obtained in said court by said The Hale Company, against the International Trading Company of America, Inc. (Rec. p. —), which judgment was assigned to Martin Rozema, the present plaintiff, since the commencement of such proceeding. (Record p. 18.)

The case was tried before the court without a jury and findings in favor of said bank, as garnishee defendant, were made and filed (R. p. 24), and judgment in its favor was thereupon entered. (R. p. 25.) After the conclusion of the evidence and before the findings were signed, the plaintiff below made and filed requests for certain special findings and declarations of law. These were all refused and exceptions thereto, as well as exceptions to the findings, were duly taken and allowed. (See Rec. pp. 78, 79, 80, 81, 82.) The bill of exceptions contains all the evidence received upon the trial relating to and material to such exceptions. (R. pp. 27-81.) It also includes the court's opinion. (See R. p. 75.)

The affidavit for the writ of garnishment is in the usual form. (See R. p. 3). The bank by its answer (R. p. 6) denies liability but admits that

it has in its hands the sum of $10,673.26 as the net profits on the sale of certain sugar to Montgomery Ward & Co., and that it holds an assignment of the interest of the International Trading Company in said net proceeds as security for a loan of $500.00. It claims, however, that it has an off-set against such net proceeds for certain disbursements made by it in connection with a certain sugar deal with John Sexton & Co. This answer was duly controverted. (See R. p. 20.)

The undisputed evidence produced upon the trial shows:

1. That in the early part of May, 1920, the International Trading Company, engaged in the importing and exporting business, sold to Montgomery Ward & Co. of Chicago, 500 tons of "White Granulated Sugar," for immediate shipment by Kelley & Company, from Hongkong, China. To provide for the payment of such sugar upon its arrival in Seattle, Montgomery Ward & Co., established an irrevocable letter of credit in Seattle for $234,000 in favor of the International Trading Company aforesaid. This letter of credit called for "White Granulated Sugar." (See Plaintiff's Exhibit No. 2, Record p. 32.)

2. In order to have such sugar shipped from Hongkong, it became necessary for the International Trading Company to have established a letter of credit in Hongkong, and it applied to said The National City Bank for that purpose. The bank refused to issue such letter, giving as a reason that the sugar market was speculative at that time and because the International Trading Company did not have sufficient credit standing. It suggested, however, that the International Trading Company see Frank Waterhouse & Co., stating that it might cost them some of their profits, but they thought Frank Waterhouse could handle the transaction for them. (See R. p. 28.)

3. The International Trading Company thereupon made a contract with Frank Waterhouse & Co. of which the following is a copy:

"FRANK WATERHOUSE & CO.
SEATTLE, U. S. A.

May 13, 1920.

"International Trading Company of America, Inc., Seattle, Washington.

"Gentlemen:

"Acting upon your request of the 13th inst., we agree to assist you in transferring funds covering sales made by you to Montgomery Ward & Co., Chi-

cago, of 500 tons sugar from Hongkong, this sugar having been purchased by you from Kelley & Company, Limited, Hongkong.

"In assisting you to transfer funds enabling you to complete the deal as between buyer and seller, it is distinctly understood that all purchases and sales of the above mentioned sugar were handled solely by you and your associates, and that our only interest in this matter is in the transfer of finances.

"In consideration of our assisting you in transfer of finances you agree to allow us a fee of one-third (1-3) of the net profit on this deal; all letters of credit are to be assigned to us thru our banking connections, finances will be handled and on the consummation of this deal, when sugar arrives and is shipped from Seattle and all drafts are paid, we will then render an accounting to you, deducting from the gross profits any expenses incurred, viz., telegraph and cable charges, interest charges, etc., and of the remaining balance we will remit to you two-thirds (2-3).

Yours very truly,
FRANK WATERHOUSE & COMPANY,
By E. J. BOXER,
Mgr. Domestic Trade Dept.

Accepted.
International Trading Company of America, Inc.
By G. W. Nelson,
Secretary and Treasurer."

(See Plaintiff's Exhibit No. 1, Record p. 29.)

4. After entering into such contract, and pursuant to its terms, the International Trading Company assigned its Montgomery Ward & Co. letter of credit to Frank Waterhouse & Co., which concern endorsed it over to the bank, and instructed the bank to open the required letter of credit in Hongkong. This the bank did on May 17, 1920, sending the following cable:

"5-17-20.

"International Banking Corporation,
Hongkong, China.

"Will accept drafts at 30 days sight drawn by Kelley & Co., Ltd., covering 500 tons standard white granulated sugar packed in double bags quality net shipping weights guaranteed by Lloyds and with Hongkong government certificates of inspection and analysis full set bills of lading endorsed in blank invoice consular invoice attached 210,000 dollars C. I. F. Seattle draft must be drawn and shipment from Hongkong prior to June 1, 1920.

"THE NATIONAL CITY BANK."

(See Plaintiff's Exhibit No. 6, Record p. 42.)

The International Trading Company had no other orders for sugar at that time and there was nothing said about other orders for sugar. The Montgomery Ward & Co. order was the only one in consideration at that time. (See Record pp. 31, 44.)

5. Within two or three days after the contract between the International Trading Company and Frank Waterhouse & Co., had been entered into, the International showed it to the bank. (See R. p 31.)

6. On May 19, 1920, the International Trading Company received an order for 155 tons of sugar from John Sexton & Co., of Chicago (R. p. 37), which was likewise to be immediately shipped from Hongkong, and they established an irrevocable letter of credit in Seattle in favor of the International Trading Company for $72,850.00 to provide for the payment of the sugar upon its arrival in Seattle. This letter of credit called for "*Standard* White Granulated Sugar." (See Plaintiff's Exhibit No. 10, Record p. 53.)

On May 22, 1920, the International Trading Company entered into a contract with Frank Waterhouse & Co., which was dated May 22, 1920, but otherwise similar in every respect to the contract between these parties, dated May 13, 1920, in regard to the Montgomery Ward & Co. transaction, with the exception of the amount of sugar which was stated to be 155 tons and the name of the buyer which was stated to be John Sexton & Co., of Chicago. (See Plaintiff's Exhibit No. 5, Record p. 38.)

After entering into this contract, and pursuant to its terms, the International Trading Company assigned the said John Sexton & Company letter of credit to Frank Waterhouse & Co., which concern in turn assigned it over to the bank, and the bank thereupon increased its credit in Hongkong by $65,-100.00 to cover the sugar ordered by John Sexton & Company, by the following cable:

"May 22, 1920.

"International Banking Corporation,
Hongkong, China.

"Referring to our telegram 17th, Kelley & Co. Ltd. letter of credit it is irrevocable increase it 150 tons 5 tons 65000 100 dollars.

"NATIONAL CITY BANK OF SEATTLE."

(See Plaintiff's Exhibit No. 9, Record p. 51.)

7. In between the Montgomery Ward & Co. transaction and the Sexton & Company transaction, there was a similar transaction in regard to a 305 ton order from a St. Paul house, which caused the bank to increase its credit in Hongkong by $128,000, but this order was never filled, and it is of no importance in this case. It is only mentioned here to explain the reference to it in the letter of credit pre-

pared by the bank. (See Plaintiff's Exhibit No. 7, Record p. 44, and next paragraph, *post.*)

8. It is customary in issuing letters of credit for the issuing or drawing institution to give a telegraphic or cable advice that it is issuing the letter of credit, and then to forward the letter of credit to the party in whose favor it is drawn, or to some banking institution at the point where the credit is to be utilized. This is done when the mail will reach there in time, but in this case it would not. The shipment had to leave on June 1st, and it was impossible to get it through before that date. The cables that were sent were the only advices that were sent by the bank to the Orient as to the terms and conditions and the manner in which the letter was being opened, and the bank had no other communication with Kelley & Co. or the International Banking Corporation in Hongkong than is shown by these cables. (See R. p. 63.)

On May 17, 1920, the bank had prepared a formal letter of credit, on account of Frank Waterhouse & Co., for $210,000, covering the 500 tons of sugar sold by the International Trading Company to Montgomery Ward & Co. (see Plaintiff's Exhibit No. 7, Record p. 44), but this letter of credit was never forwarded to the Orient, and afterwards two

accounts were added to it by interlineation: $128,000 covering the 305 tons sold to the St. Paul house and mentioned in paragraph 6, *supra*, and $65,100 covering the sugar sold to John Sexton & Co.

Some time after May 22, 1920, and after the cable increasing the credit by $65,100 had been sent, Frank Waterhouse & Co. signed the guarantee on the reverse side of said formal letter of credit, which was kept by the bank. (See R. p. 69, Plaintiff's Exhibit No. 7, Record p. 7. 46.)

The International knew nothing of this transaction, of this attempted combination of these transactions into one letter of credit, but understood that there was more than one letter of credit issued. It never saw the formal letter of credit and learned only a few days before the trial that there had been only one letter of credit issued. (See R. pp. 40, 41.)

9. The transactions in regard to the credits established in Hongkong were wholly between the bank and Frank Waterhouse & Co. They were established on account of Frank Waterhouse & Company solely. These credits were guaranteed by Frank Waterhouse & Co. alone and the bank did not look to the International Trading Company. It gave exclusive credit to Frank Waterhouse & Co. and had no contractual relations with the International

Trading Company whatever. (R. p. 63.) Furthermore, the bank, in all these dealings, had positive notice and knowledge of the relations between the International Trading Company and Frank Waterhouse & Co. and of their respective rights in the profits of these several transactions. (R. pp. 28, 31, 34, 35.)

10. On or about June 5, 1920, the International Trading Company applied to the bank for a loan of $500.00 and the bank suggested that it be given an assignment of the two-thirds interest which the International Trading Company had in the Montgomery Ward & Co. transaction as collateral security for such loan, and thereupon an assignment or order was prepared at the dictation of the bank. This assignment or order was approved by Frank Waterhouse & Co. and, with the $500 note, was delivered to the bank as collateral security thereto (see Plaintiff's Exhibits Nos. 3 and 4, R. p. 34, 35), and accepted by the bank as such. Furthermore, this note and order was accompanied by a copy of the contract between the International Trading Co. and Frank Waterhouse & Co., dated May 13, 1920, covering the Montgomery Ward & Co. transaction. (See R. p. 37.)

11. On June 23, 1923, a thirty-day draft for $244,000 from Kelley & Co. of Hongkong, covering both the Montgomery Ward & Co. shipment and the John Sexton & Co. shipment, was presented to The National City Bank for acceptance. The draft was accompanied by certain documents called for by the cabled credits and also called for by the John Sexton & Co. letter of credit, and among these documents was the Hongkong government certificate of analysis. This certificate described the sugar as "Granulated White Sugar (Java No. 24)" and "Sugar (Direct Polarization) 98.5%." Yet, notwithstanding the fact that the John Sexton & Co. letter of credit called for "*Standard* White Granulated Sugar", and, notwithstanding the fact that the bank's own cabled credits and its formal letter of credit called for "*Standard* White Granulated Sugar," the bank accepted the draft without any reservation, and thereby became irrevocably bound to pay it at the end of thirty days. (See R. pp. 62, 63, 73.)

The bank did not notify or consult the International Trading Company prior to the acceptance of the draft, or at any time thereafter, because it was not looking to the International, (see R. p. 63), but neither did it notify or consult Frank Waterhouse & Co., either before or after the acceptance of the

draft. It accepted the draft at its own risk and on its own responsibility.

There is testimony to the effect that *after the draft had been accepted*, the manager of the foreign department of Frank Waterhouse & Co., not an officer of the company, had examined the documents in question (R. p. 72), but there is no evidence whatever that he discovered or noticed the discrepancy in question or that his attention was in any way called to it, neither is there any evidence that he saw the letter of credit or the cables or that he was familiar with their terms. Indeed there is no evidence that the bank itself had discovered the discrepancy at that time.

12. The sugar for Montgomery Ward & Co. and the sugar for John Sexton & Co. arrived in Seattle on July 16, 1920, in one shipment. The Montgomery Ward & Co. letter of credit called for "Granulated White Sugar" and as the description of the sugar in the Hongkong government certificates conformed to such letter of credit, the draft on this letter of credit was promptly honored on July 22, 1920 (R. p. 67), but as to the John Sexton & Co. sugar, the said certificates not conforming to the John Sexton & Co. letter of credit, which called for "*Standard*

White Granulated Sugar", payment was refused on the same day. (R. p. 68.)

13. The net profit on the Montgomery Ward & Co., transaction was $10,673.26. (R. p. 70.) The sugar destined for John Sexton & Co. was sold by the bank on the open market in Chicago and the loss sustained thereon was $20,600.70. (R. pp. 69, 70.)

14. The bank paid the Hongkong draft for $244,000 on July 23, 1920, which it had accepted thirty days before that date. (R. p. 67.)

15. Frank Waterhouse & Co. has taken no action towards having distributed to it any of the profits of the Montgomery Ward & Co. transaction and it has agreed with the bank to share the loss equally. (R. p. 68.)

16. Immediately after payment on the Montgomery Ward & Co. transaction had been made to the bank it was served with a writ of garnishment in this proceeding. (R. p. 68.)

SPECIFICATIONS OF ERROR

1. The court erred in refusing plaintiff's request No. 1, viz:

"For a declaration of law that the contract for the purchase of the sugar, as shown in this case, were severable, separate and distinct, and the subsequent contracts of sale by the defendant International Trading Company, to-wit, to Montgomery Ward & Co. and to John Sexton & Co., were separate and distinct, and that the agreements with Frank Waterhouse & Company and the National City Bank were separate and distinct contracts, covering said respective shipments of sugar and the re-sale thereof by the International Trading Company." (R. p. 78.)

2. The court erred in refusing plaintiff's request No. 2, viz:

"For a declaration of law that the National City Bank, under the method in which it dealt with this sugar, its letter of credit, and the sugar shipments referred to therein, is estopped to deny that the said shipments were separate and distinct contracts." (R. p. 78.)

3. The court erred in refusing plaintiff's request No. 3, viz:

"For a declaration of law, on the evidence in this case, that by accepting the documents drawn

against the letter of credit issued by the National City Bank, the National City Bank acted at its peril. That as said documents did not conform to the said letter of credit, the acceptance thereof and the acceptance of the draft drawn under said letter of credit without informing the Waterhouse Company, or submitting said documents and draft to Frank Waterhouse & Company, discharged said Waterhouse & Company as guarantors on said letter of credit, and that in any event, the acceptance by the National City Bank of said draft should have been a qualified one to the extent that only said draft was in payment of 500 tons of sugar, which was to be re-shipped to Montgomery Ward & Co. That by reason of the release of said guarantor, Frank Watehouse & Company, The National City Bank became indebted to the International Trading Company in the sum of two-thirds of the sum of $10,673.26, which profit said bank had received on the re-sale of 500 tons of said sugar to Montgomery Ward & Company." (R. p. 78.)

4. The court erred in refusing plaintiff's request No. 4, viz:

"For a declaration of law that the National City Bank recognized and accepted the interest of the International Trading Company in and to the extent of two-thirds of the sum of $10,673.26 by taking an assignment of the interest of said International Trading Company in and to a contract relative to the division of said profits with Frank Waterhouse & Company." (R. p. 79.)

5. That the court erred in refusing plaintiff's request No. 5, viz:

"For a declaration of law that, under the undisputed evidence in this case, the various contracts between Frank Waterhouse & Company and the International Trading Company were separate and distinct, all of which was known to the National City Bank, and that there was no partnership or joint adventure relation existing between Frank Waterhouse & Company and the International Trading Company in either the purchase of sugar from the Orient or the re-sale thereof to Montgomery Ward & Company in one case and to John Sexton & Company in the other, and that no relation of principal and agent existed between the Waterhouse Company and the International Trading Company." (R. p. 79.)

6. The court erred in refusing plaintiff's request No. 6, viz:

"For a ruling that under the undisputed testimony in this case, the National City Bank was, at the time of the service of the writ of garnishment upon it, indebted to the defendant International Trading Company in a sum equivalent to two-thirds of $10,673.26." (R. p. 80.)

7. The court erred in refusing plaintiff's request No. 7, viz:

"For a ruling that under the undisputed testimony in this case, neither Frank Waterhouse &

Company nor the International Trading Company had any notice of non-conformity of documents presented, covering the quality, description and analysis, against the letter of credit issued by the National City Bank at any time up to and including the acceptance of the draft likewise drawn under said letter of credit." (R. p. 80.)

8. The court erred in refusing plaintiff's request No. 8, viz:

"For a ruling that under the undisputed evidence in this case, after the acceptance of the draft drawn against the National City Bank under its letter of credit, it was in no manner prejudiced by any action or lack of action by either Frank Waterhouse & Company or the International Trading Company." (R. p. 80.)

9. The court erred in refusing plaintiff's request No. 9, viz:

"For a ruling of law, under the undisputed testimony in this case, that plaintiff is entitled to judgment against the garnishee defendant in the sum of $5200.00, together with interest thereon at the rate of six per cent per annum from July 7, 1920, and for its costs." (R. p. 80.)

10. The court erred in making finding of fact No. 1 (R. p. 24), on the ground that the same is not supported by the evidence in this action or the law applicable thereto.

11. The court erred in making finding of fact No. 2 (R. p. 24), on the ground that the same is not supported by the evidence in this action and the law applicable thereto.

12. The court erred in rendering judgment in favor of the garnishee defendant because it is against the law and the evidence. (R. p. 25.)

ARGUMENT

The question in this case is: Does the bank have the right to offset its loss on the John Sexton & Co. transaction against the profits on the Montgomery Ward & Co. deal?

If it does not have such right, the plaintiff is unquestionably entitled to judgment in its favor.

The evidence in the case as shown by the record is all undisputed. We will not ask the court to weigh the evidence but will show that there is no evidence in the case, however favorably construed for the bank, warranting the answering of the above question in the affirmative.

I

Our first contention is that the bank itself was solely to blame for the loss on the John Sexton & Co. transaction.

There would have been no loss if it had done its obvious duty; that is, if it had compared the Hongkong government certificate with the John Sexton & Co., letter of credit, or with its own cables, or its own formal letter of credit. The most superficial examination of these papers would have shown that there was a glaring discrepancy between the description of the sugar in the certificates and that called for by not only the John Sexton & Co. letter of credit but by the bank's own cables and by its formal letter of credit. Any one with half an eye could have seen that a call for "*Standard* White Granulated Sugar" is not met by a sugar described as "Granulated White Sugar, Java No. 24. Sugar (Direct Polarization) 98.5%," and the bank ought to have known, if it didn't know, that a draft drawn on the John Sexton & Co. letter of credit could be refused if the description of the sugar in the certificate did not tally with the description in the letter of credit. The authorities are numerous upon this point. See *National City Bank v. Seattle National Bank*, 209 Pac. 705, (Wash.), and authorities therein cited.

If it was too indolent or too careless to make such examination itself, it might have cleared itself of responsibility by submitting the documents to Frank Waterhouse & Co. before accepting the draft, and obtaining its O. K. on them, or better still, it might have submitted the documents for approval to the Seattle National Bank where the John Sexton & Co. letter of credit was payable. By not taking such precautions, it took all the responsibility and all the risk upon itself and acted upon its peril. It was grossly negligent and inexcusably careless. Under such circumstances it must stand the loss itself, and cannot shift it upon other shoulders. See *Bank of Montreal v. Recknagel*, 109 N. Y. 482, 17 N. E. 217.

The bank does not deny its negligence, and the fact that it agreed with Waterhouse & Co. to stand half the loss indicates that it admitted its liability, for, if it were not liable, why should it stand any part of the loss? Why Waterhouse & Co. should be willing to stand any part of the loss under such circumstances is inexplicable, unless the bank was secretly interested in the profits of Waterhouse & Co. in the transactions, the suspicion of which is strengthened by the fact of the long delay in the execution of the guaranty.

The court below, to meet this situation, in its decision, puts forth a statement of fact and a proposition of law, both of which are erroneous. The statement of fact is that Frank Waterhouse & Co. had notice that the documents did not conform.

If the court meant by this that Frank Waterhouse & Co. had such notice before the draft was accepted, then it is clearly erroneous because the bank made no such claim and its own testimony is positive to the fact that Waterhouse & Co. had no notice prior to the acceptance of the draft. (See R. pp. 62, 72, 73.)

But the court evidently based this statement on the testimony of Mr. Hotchkiss, the cashier of the bank, to the effect that Mr. Boxer, the manager of the foreign department of Frank Waterhouse & Co. examined and checked all the documents called for in the letter of credit except the draft, *after the draft had been accepted* and the liability of the bank had become absolute. (See R. p. 72.)

Aside from the futility of making an examination of the documents *after the draft had been accepted*, it is plain that this does not show notice to Frank Waterhouse & Co., unless it is shown in addition that Mr. Boxer discovered the discrepancy in

question or was notified of it in some way, and there is no evidence of that kind. It does not appear for what purpose Mr. Boxer examined and checked these documents, nor whether he had before him the cables, or the bank's formal letter of credit or the John Sexton & Co. letter of credit, nor does it appear that he was at all familiar with their contents or had ever seen them. Indeed it does not appear that the bank itself, at that time, was aware of the discrepancy.

Upon this supposed notice the court builds up a theory of waiver or estoppel. It is elementary that to work an estoppel or waiver there must be positive proof of actual notice. Mere opportunity to acquire knowledge is not sufficient.

> *Tennant v. Union Central Life Ins. Co.*, 112 S. W. 754.
>
> *Ocmulgee River Lumber Co. v. Ocmulgee Valley R. Co.*, 251 Fed. 161.

Upon this erroneous assumption of fact, the court then sets forth this novel proposition of law:

"It was then the duty of Waterhouse & Co. to notify the bank that the sugar belonged to the Bank; that Waterhouse & Company had no further interest in it and they could dispose of it as they pleased, but instead of that it appears clear to the court that they were willing to take a chance on the

sugar yet. Well, they could not do that and later, when there was a loss on the sugar, repudiate the whole thing and come in and take the other tack." (R. p. 75.)

This evidently means that after the bank had made a blunder which threatened to cause a loss, Waterhouse & Co., upon receiving notice of the blunder, was put to an election either to disavow any further interest in the transaction, forego all chance of the deal going through and allow the bank to work its way out as best it could, or to absolve the bank from all blame and assume the risk of loss which threatened.

We have been unable to find any authority for such a proposition and do not believe it exists.

Assuming that Waterhouse & Co. had notice or knowledge, it would still be incumbent upon the bank to show that it was prejudiced either by an act on the part of Waterhouse & Co. or the International Trading Co., or by a failure to act on their part. There is no evidence of any affirmative act on the part of either of them, so it must be concluded that the court considered that silence or failure to act on their part worked an estoppel.

Nothing is better established by the authorities than that mere silence upon which no action has

been predicated, no liability incurred, and from which no loss has been sustained, does not amount to an estoppel. There must have been some act done or omitted, or change of position made by the person claiming the estoppel. Silence which causes no prejudice does not estop.

See:

Train v. Keefer, 31 Ala. 136.
In re Loll, 162 Fed. 79.
Durham v. Steele, 55 N. W. 509.
Estoppel, 19 Cent. Dig. par. 142.
21 C. J. 1150.

As for that part of the court's statement that after Waterhouse & Co. had acquired notice or knowledge of the mistake made by the bank, it was "*still willing to take a chance*", this is wholly without foundation in the evidence. The evidence does not show that Waterhouse & Co. had any ideas on that subject, one way or the other. But if they had been "*still willing to take a chance*", they would not thereby have prejudiced their right to hold the bank responsible for the blunder. They had a perfect right to wait to see whether or not Sexton & Co., would take advantage of the blunder. If they had not taken advantage of it, there would have been a handsome profit in the deal, and it would be absurd

to say that the bank, after making its blunder, had a right to compel Waterhouse & Co. to either forego a possible profit, or to assume a possible loss. What had Waterhouse & Co. done that they should deserve to be put to such a choice?

Furthermore, the record does not show that either Waterhouse & Co. or the International Trading Co. had possession or control of the sugar at any time, or that they attempted to do anything with it. The record does show, on the contrary, that the bank retained control of the sugar and sold it in the open market and appropriated the proceeds. (R. p. 69.)

II

But, assuming that the bank was entirely blameless in the matter of the loss on the John Sexton & Co. transaction, and further assuming that as against Frank Waterhouse & Co., the bank had a right to set off against such loss the net proceeds of the Montgomery Ward & Co. transaction, by virtue of the guarantee contract on the back of the letter of credit, yet it does not follow that it had such right as against the International Trading Company, and we emphatically dispute such a claim.

We claim that there is no evidence whatever justifying the conclusion that the International Trading Company, at any time, either *expressly or impliedly*, authorized Frank Waterhouse & Co. to pledge its two-thirds interest in the net proceeds of the Mont-

gomery Ward & Co. transaction for any loss that might be incurred in connection with the John Sexton & Co. transaction, and that consequently such pledge, if made by Frank Waterhouse & Co., was null and void, and not binding upon the International Trading Co.

The following facts stand out prominently on the face of the record and are undisputable:

1. That before dealing with Frank Waterhouse & Co., the International Trading Company was entitled to *all* of the net proceeds that might be realized from the Montgomery Ward & Co. transaction.

2. That upon the execution of the contract of May 13, 1920, between the International Trading Company and Frank Waterhouse & Co., the latter became entitled to *one-third* of such net profits, *and no more;* that the right to the other two-thirds was and remained in the International Trading Company.

3. That the bank had at all times full and complete notice and knowledge of the respective rights of these parties in such net proceeds.

4. That in connection with the letters of credit, the bank dealt solely with Waterhouse & Co., and

had no contractual relations with the International Trading Company whatever.

5. That the International Trading Company never *expressly* authorized Frank Waterhouse & Co. to pledge its two-thirds interest in the net proceeds of the Montgomery Ward & Co. transaction for any purpose.

The foregoing propositions being undisputable, it follows that if Frank Waterhouse & Co. had such authority, it must have been *implied*, and an *implied* authority cannot be conceived of under the evidence in this case unless it is sought for in the legal relationship of the parties. The court below recognized this and held that there was a copartnership or agency when it said:

"Whether this arrangement between Nelson (meaning the International Trading Company) and Waterhouse & Co. is treated as a partnership or as a joint adventure or joint enterprise, or whatever you may designate it, I am convinced that Waterhouse & Co. was the fully authorized agent of the International Trading Company to make whatever arrangements were necessary in order to secure finances. This being true, this guaranty that was put on the back of the letter of credit was the final step in securing the money. If it is not looked at as contemplated in the first borrowing, the agency would authorize Waterhouse & Co. to guarantee and

pledge and give a lien on the whole of the proceeds of the transaction to secure the bank in making the arrangement for the money, and I find that everything was pledged by that guaranty on the back of the letter of credit." . . . "Regarding this question of the documents: If Waterhouse & Co. were guarantors and nothing else, there might and would be a more serious question in the case. . . . What makes this governed by another rule is this fact, that is, that Waterhouse & Co. where interested not only in the documents but in the sugar." (See R. p. 74.)

When the court imputed to these parties a partnership relation or the kindred relation of joint adventurers, it evidently overlooked the following significant clause in the contracts between these parties:

"It is distinctly understood that all purchases and sales of the above mentioned sugar were handled solely by you and your associates, and that our only interest in this matter is in the transfer of finances." (See R. pp. 29, 38.)

Frank Waterhouse & Co. evidently feared that it might possibly be considered as sustaining a partnership relation to the International Trading Company, and, therefore, to guard against such an implication, it expressly stipulated in both contracts, that its only interest was in the matter of the transfer of finances, and that it was not to be considered

as interested in the sugar. This clause disposes of the theory that there was a partnership relation between these parties, for there cannot be a partnership relation without consent of the parties interested, in the absence of estoppel or ratification, and there is no question of estoppel or ratification in this case.

"The law does not surprise parties into a partnership against their will in the absence of ratification or estoppel."

Nat'l Lumber & Box Co. v. Grays Harbor Comm. Co., 71 Wash 31.

"Where no partnership is intended, the mere agreement to assist or serve another and to receive a share of the profits of the business as compensation for services does not constitute a partnership." 30 Cyc. 362.

See also *Foley v. McKinley*, 131 N. W. 316 (Minn.)

It will also be noticed that the contracts between these parties do not provide for an assignment to Frank Waterhouse & Co. of the sugar contracts which the International Trading Co. had with both Chicago parties. This fact also shows that Waterhouse & Co. did not have, and did not want, an interest in the sugar.

Moreover, nearly all the authorities agree that in order to constitute a partnership there must be (a) a mutual agency, (b) a community of interest or common business, (c) an intent to form a partnership, and (d) an agreement to share profits and losses.

None of these elements are present in the instant case, except an agreement to share profits. It seems that under the earlier English decisions and under a few of the decisions of some American courts, a division of profits might alone constitute a partnership. (See Vol. 22, A. & E. Encyc. of Law, p. 20 and Chap. III of Rowley's Law of Partnership.) But such English decisions have been overruled long ago, and only a few of the American jurisdictiors still adhere to them, and even these make an exception to the rule when the share of the net profits is given for certain stipulated services. (See Rowley, *supra*, Sec. 75 *et seq.*) In the State of Washington, the early English decisions have never been followed. (See *Balch v. Big Store Co.*, 46 Wash. 1.)

The above shows that no partnership relation can be inferred from the evidence, and hence no agency can be implied from that relation.

Akin to the theory that there was a partnership relation, is the theory of the court below that Waterhouse & Co. was interested in the sugar. Even if this latter theory were correct, it is not clear what authority such fact would give to Waterhouse & Co. to pledge the interest of the International Trading Company in the sugar or its proceeds, but the court seems to have considered this a very important point for it intimated that if Waterhouse & Co. had not been interested in the sugar, its decision would have been different.

As we have seen that the partnership theory is directly negatived by the second paragraph of the contract between the International Trading Co. and Waterhouse & Co., so is this theory also negatived thereby. But regardless of that paragraph, it is evident from the other parts of the contract as well that Waterhouse & Co. was interested only in the net profits of the sugar and not in the sugar itself.

The court below, in holding that Waterhouse & Co. was interested in the sugar evidently meant to convey the idea that it had "a power coupled with an interest."

Chief Justice Marshall, in *Hunt v. Rousmanier*, 8 Wheat. 204, 5 L. ed. 597, in discussing the meaning

of the expression "a power coupled with an interest", said:

"A power coupled with an interest is a power which accompanies or is connected with an interest. The power and interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exerecise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be coupled with it."

In *McKillop v. Dewitz*, 140 Pac. 1161, and in *Rucker & Co. v. Glennon*, 107 S. E. 725, this principal is passed on in connection with agencies for the sale of real estate, and in both cases a distinction is likewise made between an interest in the subject of the agency and the proceeds or profits resulting from the exercise of the agency.

It now remains to be seen whether an agency can be otherwise implied. But first, it must be determined what is meant by "agency". There are two senses in which the term is used, the broad and the narrow sense.

In its *broad* sense, the word "agency" indicates the relationship which exists when one person is

employed to act for another. The court below evidently had simply this idea in mind when it held that Frank Waterhouse & Co. was the agent of the International Trading Company, and it must be admitted that Frank Waterhouse & Co. was employed to act for the International Trading Company, and consequently was, in such *broad* sense, an agent. *But every agent in the broad sense of the term does not have authority to bind his principal.*

In the broad sense of the term there are three classes of relations which come within the definition of "agency", viz: (1) The relation of principal and agent as understood in ordinary legal usage; (2) the relation of master and servant; and, (3) the relation of employer or proprietor and independent contractor. (See Mechem on Agency, Sec. 25.)

For obvious reasons, the second relation will be disregarded in this discussion.

It is only when the relation of the first class mentioned exists, that the agent can bind the principal, and it is therefore necessary to determine whether the relationship existing between the International Trading Co. and Frank Waterhouse & Company falls into one class or the other before it can be known whether Frank Waterhouse & Co. had im-

plied authority to bind the International Trading Company in its dealings with the bank.

Mechem on Agency (2nd ed.) defines these classes as follows:

"The relation of principal and agent, or the relation of agency, in the narrower sense . . . . . is the legal relation which exists where one person, called the agent, is authorized . . . to represent and act for another, called the principal, in the contractual dealings of the latter with third persons. The distinguishing feature of agency may briefly be said to be its representative character and its derivative authority." Sec. 26.

"The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate, contractual obligations between his principal and third persons. To the proper performance of his functions therefore, it is absolutely essential that there shall be third persons in contemplation, between whom and the principal legal obligations are to be thus created, modified or otherwise affected, by acts of the agent." Sec. 36.

"In ordinary legal usage, the agent, . . . is to be . . . distinguished from the "independent contractor" who is one who exercises some independent employment in the course of which he undertakes, supplying his own materials, services and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the

end to be achieved, rather than for the means by which he accomplishes it. Such a person is not an agent in the sense in which the term is used, and has no authority to bind his employer in any form of contractual dealings." Sec. 40.

From these definitions it can be plainly seen that the relationship existing between the International Trading Company and Frank Waterhouse & Co. was not that of principal and agent, proper, but that of employer or proprietor and independent contractor, for (1) there were no contractual dealings between the bank and the International Trading Co. (except as the $500 loan). Frank Waterhouse & Co. acted only for itself in its dealings with the bank, and was not authorized to and did not create contractual relations between the International Trading Company and the bank, and (2) Frank Waterhouse & Co. exercised an independent employment in the course of which it undertook to perform a certain definite service for the International, to accomplish a certain definite result, supplying its own means of doing so, and not subject to the direction and control of the International Trading Company, but being responsible to it only for the result to be achieved. It insisted upon and obtained complete charge of the matter of obtaining the letters of credit, and the International Trading

Company had nothing to do with it and had nothing to say about it.

It cannot be disputed therefore that Frank Waterhouse & Co. did not come with the narrower definition of agency, as ordinarily understood in legal usage, but was an independent contractor and hence had no power to bind the International Trading Company without express authority.

But even if the fact of agency in its narrower sense had been established, still the bank would have been obliged to show that Waterhouse & Co. had authority to make the pledge in behalf of the International Trading Co. (see Vol. 1, A. & E. Encyc. of Law, pp. 987 and 993), and one of the matters to be shown would be the *necessity* of the act. The court below recognized this when it held that Waterhouse & Co. had authority to make whatever arrangements were *necessary* in order to secure finances.

Was it necessary that Frank Waterhouse & Co. pledge the proceeds of the Montgomery Ward & Co. transaction for the John Sexton & Co. transaction?

The answer is, that the credits had already been issued when the guaranty was executed, and there is no evidence of a previous arrangement for such

pledge; no evidence that the bank asked or stipulated for such pledge; no evidence that the bank would have refused to establish the credits if it had not been assured that such credits would be given. On the contrary, all the evidence indicates that the matter of giving such pledge was never considered by the parties in advance; and that the giving of it was a mere perfunctory matter.

There remains yet to be dealt with the notion that because the Montgomery Ward & Co. deal and the John Sexton & Co. deal both belonged to the International Trading Company and because that company entered into similar contracts with respect to them with Frank Waterhouse & Co., they were, by reason of that fact only, in some way related to, or connected with, each other, so that the proceeds of one could be applied upon any loss that might be occasioned on account of the other, without an express contract to that effect.

That there is no merit in this notion is evident when it is considered that the Montgomery Ward & Co. contract and the John Sexton & Co. contract were wholly unrelated, and that the two contracts between the International Trading Company and Frank Waterhouse & Co., were made and dated at different dates, to-wit: May 13, 1920, and May 22,

1920; that they claimed no relationship with one another; that there is not even a reference in one as to the other; that the contracts themselves are the only competent and the best evidence of the intention of the parties, and that these show no such intention; and that there is no evidence of any kind, competent or incompetent, outside of the contracts, which show or even tend to show that one was dependent upon or connected with the other.

In *Clark v. Neumann*, 76 N. W. 892, a similar notion was advanced under a state of facts which justified it much more than in the instant case. The opinion of the court in that case is so applicable to the instant case that we think a somewhat extended quotation from it is excusable. In that case, there were four separate and complete written agreements made simultaneously. Each of them was for the purchase and sale of one-quarter of a single section of land. The north half of the section was much more valuable than the south half, but the purchase price in each contract was $5.00 per acre. The purchaser defaulted on his payments on the south half and it was insisted on behalf of the seller that there was but one transaction between the parties, and that the several written agreements were inter-dependent parts of a single indivisible

contract. It was admitted by the defendant that he could not have bought the north half without buying the south half. The court says:

"The difficulty with this position is that the contracts claim no relationship with one another. Whatever may have been the reason for dividing the transaction into four separate and distinct parts, it is entirely certain that such division has been made. Each contract, under the issues in this case, is the exclusive evidence of the rights and obligations of the parties resulting from the sale of 160 acres of land. No one of the contracts contains any reference to the others. . . . The contracts themselves are the only competent evidence of the intention of the parties. Had the company intended to reserve a vendor's lien on all the land as security for the entire purchase money it is reasonable to suppose the evidence of that purpose would have appeared in the contracts. To charge the north half of the section with the amounts delinquent on the south half, would, doubtless, accomplish substantial justice between the parties; but it could not be done without disregarding their express agreement, and releasing the company from its stipulation to make a deed of conveyance for each quarter section as soon as the consideration therefor should be paid. The fact that the company would not have sold Neumann the north half if he had not purchased the south half at the same time, affords no evidence, competent or incompetent, of an understanding that the unpaid purchase money should be a general lien on the whole tract. The inference is that the com-

pany was satisfied with the security for which it contracted. If the south half was not adequate for the part of the purchase price apportioned thereto, it may be that the personal responsibility of the purchaser was relied on in severing the transaction. But it is needless to speculate in regard to this matter. The parties have made their own engagements and put them in writing. They must now abide by them."

In *Hennerschotz v. Gallagher*, 16 Atl. 518, there were two contracts, of date nine months apart. Each was complete in itself, and neither contained any reference to the other. It was claimed, and it appeared, that the lands mentioned in both contracts were the same. The court says that it was clear as a matter of law that the two agreements were separate and distinct, and that the evidence that was presented to show that they were in fact intended to be one was actually lacking in the essentials of clearness, precision and convincing force necessary to reform a written instrument. But that this need not be discussed, as in the entire absence of any ground laid of fraud, accident or mistake in the making of either agreement, parol evidence was not admissible at all to affect the legal construction.

III

As further and conclusive proof that all parties, the bank, as well as the International Trading Company and Frank Waterhouse & Co., considered and treated the Montgomery Ward & Company transaction and the John Sexton & Co. transaction as separate, distinct and independent deals, and not in any manner connected or joined or dependent upon each other, we call the court's attention to the transaction between the bank and the International Trading Company in connection with the $500 loan.

This was shortly after the guaranty was signed, when the matter was still fresh, and yet the Montgomery Ward & Co. transaction was then treated as wholly independent and unconnected with the John Sexton & Co. transaction. If the bank had then considered that the one transaction was connected or tied up with the other they would have been so treated, and not having done so, we contend that by taking the order or assignment in question, it is now estopped from claiming not only that the title or right to the interest in the net proceeds of the Montgomery Ward & Co. deal is in the International Trading Company, but is also estopped from claiming that it had a prior lien on such proceeds

for any loss that might be sustained on the John Sexton & Co. transaction.

We claim that this contention is sustained by the following authorities:

"If in making a contract or in the course of dealing the title of one party or the other to the property involved in the transaction is recognized, and the dealing proceeds upon that basis, both parties are ordinarily estopped to deny that title or to assert anything in derogation of it."

16 Cyc. 802; 21 C. J. 1238; *Ladd v. Tilton*, 49 L. R. A. (N. S.) 657.

"A trustee is estopped to set up in himself any title adverse to those for whom he holds, or to deny their title. Neither can he deny the legality or validity of the trust, or deny that the creator of the trust held the title to the property which the instrument conveys."

16 Cyc. 952.

"So long as a pledgee of stock holds it as security for a debt, he cannot claim a holding adverse to the pledgor so as to acquire title under the statute of limitations."

Cross v. Read, 14 Pac. 885.

"The pledgee is estopped to deny the title of the pledgor either by claiming the title to the property in himself or by setting up the title of a third person to the property pledged to him by the pledgor."

31 Cyc. 807, 808.

The same principle is enforced in a number of other circumstances, as that a tenant cannot dispute his landlords title; the purchaser of land not fully paid for cannot dispute the title of his vendor; a bailee cannot deny the title of his bailor; a depositary can not dispute the title of his depository; a receiptor cannot dispute the title of the officer, a pledgee cannot dispute the title of the pledgor, etc. (See Bigelow on Estoppel, Chapter XVII.)

IV

Recapitulation

First: The bank alone was responsible for the loss and alone should stand the loss.

It cannot claim estoppel because no notice or knowledge is shown, nor is shown any act or omission by which the bank was prejudiced.

Second: Even if the bank were not to blame for the loss, its right to off-set it against the money belonging to the International Trading Co. would depend upon whether Frank Waterhouse & Co. had authority to pledge it, and this authority is negatived by the fact that the evidence fails to show express authority; because a partnership relation is

negatived by an express written stipulation to that effect between the parties and the absence of elements in the contract essential to the constitution of a partnership; because Waterhouse & Co. had no interest in the sugar but only in the net profits; because the contracts had no connection with each other; because Waterhouse & Co. was not an agent with power to bind the International but was an independent contractor, and further because the pledge was entirely unnecessary.

THIRD: Because all parties concerned in the transaction relating to the $500 loan treated the two transactions as separate, and the bank, by accepting the order or assignment as collateral security, is estopped from disputing the right and title of the International to it or of claiming that it had a prior lien on it.

Inasmuch therefore, as the bank has admitted that it had in its hands at the time the writ of garnishment was served the sum of $10,673.26, of which two-thirds unquestionably belongs to the International Trading Company in the absence of the right of the bank to offset anything against it, and it having been demonstrated that it has no such right, it follows that the plaintiff was entitled to

judgment in the court below, and we therefore respectfully submit that the judgment of the court below should be reversed and that court ordered to enter judgment in favor of plaintiff in error.

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